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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted] 51

KROPP FORGE COMPANY AND KROPP FORGE AVIATION COMPANY,

*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF.

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*Petitioners,*

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NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Kropp Forge Company, a corporation, and Kropp Forge Aviation Company, a corporation, respectfully pray that this Court issue a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit, wherein that Court on January 31, 1950, entered a decree enforcing an order of the National Labor Relations Board entered on June 14, 1946.

## A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioners are Illinois corporations engaged in the manufacture of steel forgings.[1] The cause herein arose from a complaint filed by the National Labor Relations Board on June 8, 1945, and the Board's first amended complaint filed on July 20, 1945, based on charges filed by the United Automobile Workers, then an A. F. of L. union, and International Brotherhood of Blacksmiths and Drop Forgers and Helpers, an A. F. of L. union. The complaint and amended complaint alleged that petitioners had engaged and were engaging in unfair labor practices within the meanings of Sections 8(1) and 8(2)[2] of the Act, in dominating and interfering with the formation and administration of and contributing to the support of Employees' Association of Kropp Forge Company, a labor organization admitting to membership the employees of petitioner, and by interfering with, restraining and coercing their employees in the exercise of the rights guaranteed them under Section 7 of the Act.

After proceedings pursuant to the Act, the Board, on June 14, 1946, entered its decision finding respondents had been guilty of unfair labor practices within Sections 8 (1) and 8(2) and issued its order directing petitioners to cease and desist from dominating or interfering with the administration of, or contributing support to, Employees' Association of the Kropp Forge Company, or any other labor organization, or any successor thereto, as the bar-

1. The Kropp Forge Aviation Co. is a wholly owned subsidiary of Kropp Forge Company.

2. Sections 8(1) and 8(2) are now Sections 8(a)(1) and 8(a)(2) under the 1947 Act (Title 29 U. S. C. A. Supp. §158 (a)(1) and (2)).

gaining representative of any of their employees; giving effect to the contract with the Association, dated February 26, 1945, or to any other contract with said Association; and in any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to bargain through representatives of their own choosing and to engage in concerted activity for purposes of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the National Labor Relations Act (29 U. S. C. A. Supp. § 157). The order also required petitioners to withdraw all recognition from and disestablish the Association or any successor thereto; discontinue the Labor Management Committee as a medium for dealing with their employees with respect to grievances, wages and any other conditions of employment; and to post notices of compliance.

The Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of its order on April 22, 1949, and on December 30, 1949, the Court of Appeals entered its decision that the Board's order should be enforced. Petitioners filed a petition for rehearing on January 16, 1950, which was overruled on January 31, 1950, and a decree was entered by the Court of Appeals pursuant to its decision on January 31, 1950.

It is the Petitioners' position that the decision and order of the Board are based in a large measure on statements of the Companies' officers and supervisory personnel, which were at most expressions of views, arguments or opinions, and did not contain threats of reprisal or force, or promises of benefit and, therefore, the decision of the Board is in violation of Section 8(c) of the National Labor Relations Act (29 U. S. C. A. Supp. § 158(c)), and the First Amendment to the Constitution of the United States. The decision of the Court of Appeals that the order of the Board should be enforced is therefore, erroneous.

## B. OPINIONS BELOW.

The decision of the Court of Appeals is reported in 178 Fed. (2d) 822. The decision and order of the National Labor Relations Board is reported in 68 N. L. R. B. 617.

## C. BASIS OF JURISDICTION.

Jurisdiction of this Court is based on Section 10(e) of the National Labor Relations Act (29 U. S. C. A. Supp. § 160(e)), and Sections 346 and 347 of the Judicial Code, as revised (28 U. S. C. A. § 1254).

## D. STATEMENT OF THE CASE.

The Board, in arriving at its decision, relied upon certain statements and utterances of petitioners' officers and supervisory personnel which petitioners contend were, at most, expressions of views, arguments or opinions, and did not contain any threats of reprisal, force, or promise of benefit, and that in view of the passage of Section 8(c) of the Act (29 U. S. C. A. Supp. § 158(c)), the order of the Board should not be enforced.

Petitioners further urged that in the absence of those statements and utterances, the other acts relied upon by the Board were insufficient to sustain the decision of the Board that petitioners were guilty of an unfair labor practice within the meaning of Sections 8(a)(1) and 8(a)(2) of the Act (29 U. S. C. A. Supp. § 158(a)(1) and (2)).

The Court of Appeals found that *with* the statements there was sufficient evidence to support the Board's decision and the Court did not consider the sufficiency of the other acts in the absence of those statements. There the Court stated, 178 Fed. (2d) 822, at pages 827, 829:

> "Our examination of this entire record, including the statements and expressions of respondents' officers and supervisors, convinces us that there was substantial evidence to support the findings of the Board. * * *
>
> "It is, therefore, our duty to enforce the order of the Board unless, as respondents contend, the consideration by the Board of the statements of respondents' officers and representatives was improper under Section 8(c) of the Act. * * *
>
> "We * * * hold that the statements and expressions here in question were properly considered by the Board as constituting, and as evidence of, unfair labor practice by respondents."

The statements and utterances in question and the circumstances under which they were uttered are as follows:

Prior to 1939, except for a small group of die sinkers, and truck drivers, who were represented by affiliated labor organizations of their own choice, the employees of the Company had no collective bargaining representative (B.A. 54;[1] 63, n. 16; 103, 167, 180-181, 189, 191).

In October, 1939, as a result of the activity of William Ohlson, an old employee of Kropp Forge, and an A. F. of L. adherent, union circulars were distributed outside the plant by the International Brotherhood of Blacksmiths, Drop Forgers and Helpers (hereinafter referred to as

1. References to the portions of the transcript of proceedings printed in the Appendix to the brief of the National Labor Relations Board to the Court of Appeals, are made as follows: (B.A. ....). References to the portions of said transcript printed in the Appendix to the companies' brief to the Court of Appeals, are made as follows: (R.A. ....).

"Blacksmiths") and the International Association of Machinists (hereinafter called "Machinists"), two labor unions, both of which were then affiliated with the A. F. of L. (B.A. 54; 116-118, 129). On the day these circulars were being passed out, Plant Manager Helstrom stated to Ohlson, *"Listen, Bill, I don't want no organization in here"* (B.A. 54; 108, 118, 187). Ohlson persisted in his efforts and Helstrom again told him he didn't want any organization in the plant (B.A. 56; 118). The passing out of the Union circulars in October was the only activity taken by the A. F. of L. and nothing further was done to promote the A. F. of L. at that time. About December 15, 1939, some two months after the handbills were passed out, Ohlson prepared some round-robin petitions which stated that the signers were in favor of forming a labor organization (B.A. 54; 105, 112-113, 116-117, 130, 278). The petition did not specify any particular organization but left that question open for subsequent determination by the interested employees (B.A. 54; 115, 105, 116-117, 130, 279). These petitions were circulated during working hours and about 90% of the employees signed them (B.A. 54-55; 104-105, 112, 116-117, 130, 280-281). Thereupon, Roy Kropp, President, summoned 15 or 20 of the key men of the shop to a conference in the plant offices, after working hours (B.A. 55; 107-108, 113-114). The Vice-President, Raymond Kropp; Secretary, Charles F. Johnson; and Plant Manager, Helstrom were present. The Board's witness, Edberg, testified that these officials *"suggested or referred to it that they couldn't stop us in regard to organizing, but to try to make it a shop organization * * *"* (B.A. 55; 107-108, 113-114).

Shortly thereafter Helstrom offered the employees the use of the plant machine shop for a meeting and election to determine what kind of an organization they should have (B.A. 56, 118-119, 124, 131). On December 30th, Ohl-

son posted on the bulletin boards notices prepared by one of the office employees, announcing that such a meeting would be held at the close of work on noon of that day, in the machine shop (B.A. 56, 112, 113, 118-119, 120-121, 105, 137, 323).

On the same morning, there was posted on the bulletin boards, a notice over the signature of President Kropp, announcing that in celebration of the winding up of the old year, beer and sandwiches would be served at noon that day in the same machine shop (B.A. 57, 106, 137, 120-121, 323).

On the same morning also, about two hours before the scheduled meeting, President Kropp stopped Ohlson, the A. F. of L. adherent, and the admitted instigator of the Association, and in the presence of Secretary Johnson, said, *"I don't care whether the employees form an independent organization or one affiliated with the A. F. of L., but for the love of Pete, anything but the C. I. O."* (B.A. 56, 120). On cross-examination, Ohlson testified that at that conversation Mr. Roy Kropp and Johnson also said, *"they didn't care whether you had an independent union or an A. F. of L. union, that it was entirely up to the men, and that he* (Roy Kropp) *and Johnson would cooperate with any union that was selected"* (R.A. 14, 15, 16). About one-third of the employees attended the meeting (B.A. 58, 120, 121, 129, 202, 229). Ohlson acted as Chairman (B.A. 58, 122). *Helstrom, present at the outset of the meeting, told the employees they were free to meet in the machine shop and then left* (B.A. 58, 120, 121, 122, 129, 202, 229).

At the meeting in the machine shop, after a discussion of the relative merits of organizing as an affiliate of the A. F. of L., the C. I. O., or as an independent union (B.A. 68, 121), the overwhelming majority of the employees present voted for a shop organization. The A. F. of L. received not more than 3 or 4 votes and the C. I. O. not

more than 6 votes (B.A. 58, 68, 121, 122, 123). After the meeting, beer and sandwiches were served in the machine shop. Helstrom and Foremen Carlson and Dahl returned for this party and the two foremen *congratulated Ohlson on the decision of the employees to have an independent organization* (B.A. 43; 58; 123).

While activity of rival A. F. of L. unions was in progress during 1944, two conversations between representatives of petitioners and employees occurred. The first of these conversations occurred when Plant Manager Sweeney summoned employee Areen to his office and asked him what he knew about the A. F. of L. (B.A. 75, 241-242). Areen answered that he didn't care; that he was going to leave Kropp Forge pretty soon and then Sweeney said, *"Well, Dave, stick with me. You will go places"* (B.A. 242). The second conversation occurred between employee Clinton and Superintendent Lane. Clinton went to Lane and asked him for a raise. Lane gave him no definite answer about the raise but asked him what he knew about the A. F. of L. Clinton said there was activity within the shop and Lane then said, *"We don't want the A. F. of L. in here. * * * They won't do us any good. * * * The Association could do as much for the men as any outside organization or more"* (B.A. 77, 148-149). On cross-examination, Clinton testified, "I rather thought Tom Lane was stating his preference" (R.A. 38).

The record shows that petitioners allowed their employees to discuss union matters freely in the plant and the trial examiner so found (B.A. 84).

The material findings of the Board in question, relating to these statements, are as follows (B.A. 43-44):

> "We agree with and adopt the Trial Examiner's concluding finding that the respondent violated Section 8(1) and (2) of the Act with respect to the Association. We rely particularly upon the following evidentiary findings: (1) When the employees were

forming a labor organization, Kropp Forge urged them to make it a shop organization, gave them a party designed to influence them to that end, and congratulated them when they voted to follow management's desire. * * * (3) Thereafter, the Company contributed support to the Association in various ways: * * * by stating that the Association could do more for the employees than an outside union. (4) The Companies further assisted the Association by statements of the President Roy Kropp that he did not want the C. I. O., and Superintendent Lane that the Companies did not want the A. F. of L. and by the questioning of employees by Plant Manager Sweeney and Superintendent Lane about the A. F. of L."

In reply to respondent's contention that these statements fall within the free speech guarantee of the First Amendment to the Constitution, the Board stated (B.A. 44):

> "The respondents also contend that the statements attributed to them fall within the free-speech guarantee of the Constitution because they were mere expressions of preference and contained no 'threat, coercion or intimidation.' In the light of the respondents' entire course of conduct and also because the statements went further than merely expressing an opinion as to the merits of the labor organization involved, we find that the Trial Examiner was correct in holding that the statements were not privileged as free speech."

The Board further stated (B.A. 45):

> "We find, upon the entire record, that the respondents dominated and interfered with the formation and administration of, and contributed support to, the Association. We further find that by such acts, and by the statements and questions of President Roy Kropp, Plant Managers Hellstrom and Sweeney, and Superintendent Lane, the respondents interfered with, restrained, and coerced their employees in the exercise of rights guaranteed in Section 7 of the Act."

The decision of the Board was rendered before the Taft-Hartley Act amended the National Labor Relations Act by adding Section 8(c) (29 U. S. C. A. Supp. § 158(c)). Petitioners contended before the Court of Appeals that this Section applies to the instant case. (See *Pittsburgh Steamship Company, Petitioner* v. *N. L. R. B., Respondent,* (U. S. C. A. 6th) #10372, decided February 17, 1950, 17 Labor Cases, C. C. H. No. 65612; and *N. L. R. B.* v. *E. C. Atkins & Co.,* (C. C. A. 7, 1947), 165 F. (2d) 659.)

Petitioners further contended that the statements and utterances above set forth show no threats of reprisal or force, or promises of benefit, and were, at most, only expressions of views, arguments or opinions and that the Board's order, which was based in a large measure upon these statements, should not be enforced. The Court of Appeals, without making any determination as to whether or not the statements set forth did constitute threats of reprisal, force, or promises of benefit, within the meaning of Section 8(c) (29 U. S. C. A. Supp. § 158(c)), and without a determination of that question ever having been made by the Board, proceeded to hold that the statements and expressions were properly considered as constituting evidence of unfair labor practices by respondents. The Court of Appeals was of the view that in spite of Section 8(c), the Board and the Courts could still consider statements and utterances of an employer, without determining whether such statements contained threats of reprisal or force, or promises of benefit, as "part of a general pattern or course of conduct" which discloses action evincing an unfair labor practice.

## E. QUESTIONS PRESENTED.

The questions presented fall into two categories: (1) questions under Section 8(c) of the Act, and (2) questions under the First Amendment to the Constitution of the United States.

### 1. Questions Presented Under Section 8(c) of the National Labor Relations Act.

The following questions are presented under Section 8(c) of the Act:

(a) Should the Court of Appeals, since the passage of Section 8(c), enforce a decision of the Board in which statements of the companies' officers and supervisory personnel were held to constitute and be evidence of an unfair labor practice, where there has been no finding by either the Board or the Court of Appeals, that such statements contain threats of reprisal, force or promises of benefit?

(b) Do the statements in question constitute threats of reprisal or force, or promises of benefit, and therefore fall without the protection of Section 8(c) of the Act?

(c) May such statements constitute or be evidence of an unfair labor practice as "part of a general pattern or course of conduct" of an employer when they do not contain any threats or promises?

### 2. Questions Presented Under the First Amendment to the Constitution of the United States.

(a) Does the First Amendment apply to the statements and utterances of an employer to its employees?

(b) In view of the First Amendment, may Sections

8(a)(1) and 8(a)(2) of the Act, be interpreted to apply to statements and utterances by an employer and his supervisory personnel, when such statements did not threaten reprisal, force or benefits, or otherwise indicate the use of the employer's economic power to override the will of the employees?

(c) Do the statements of petitioners' officers and supervisory personnel constitute free speech within the protection of the First Amendment?

## F. REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals as to the interpretation of Section 8(c) of the Act is in conflict with the decisions of other Courts of Appeals,[1] with the decisions of the National Labor Relations Board,[2] and contrary to the legislative intent of Congress in passing Section 8(c).[3] This conflict should be settled by this court so that the courts, the Board, employers, employees and labor unions may know the extent to which an employer's utterances may be used in unfair labor practice proceedings.

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1. *Pittsburgh Steamship Co.* v. *N. L. R. B.* (U. S. C. A. 6, No. 10372, decided Feb. 17, 1950), 17 Labor Cases (CCH #65612); *N. L. R. B* v. *O'Keefe & Merritt Mfg. Co.* (U. S. C. A. 9) 178 F. (2d) 445, decided Dec. 2, 1949.

2. *General Shoe Corp.*, 77 N. L. R. B. 124; *John Deere Plow Co.*, 82 N. L. R. B. 69; *Mylan Sparta Co., Inc.*, 78 N. L. R. B. 1144; *Tygart Sportswear Co. & MacLaren Sportswear Corp.*, 77 N. L. R. B. 613; *Fontaine Converting Works, Inc.*, 77 N. L. R. B. 1386; *Carpenter Steel Co.*, 76 N. L. R. B. 670; *Babcock & Wilcox Co.*, 77 N. L. R. B. 577.

3. House Report No. 245, 80th Congress, 1st Session page 33; Senate Report No. 105, 80th Congress, 1st Session, page 23; House Conference Report No. 510, 80th Congress, 1st Session, page 45.

2. The free speech provisions of Section 8(c) are of major importance in the administration of the Act, which have not heretofore been passed upon by this Court, and this case presents important questions of interpretation of that section which should be decided by this Court.

3. The decisions of the Board and the Court of Appeals are an unwarranted encroachment on the right of free speech guaranteed to an employer under the First Amendment and presents a matter of public importance which should be determined by this Court.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case on its docket as No. 9883, and that said judgment and decree of the United States Court of Appeals be reversed by this Honorable Court, or, in the alternative, that the judgment of the said United States Court of Appeals be reversed and it be directed to remand this case to the National Labor Relations Board for further proceedings.

Dated: April 24, 1950.

KROPP FORGE COMPANY and
KROPP FORGE AVIATION COMPANY,
*Petitioners,*

By: HUGH FULTON,
LEO T. NORVILLE and
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*Attorneys for Petitioners.*

## BRIEF.

### I.

**This Case Presents Important Questions Concerning the Interpretation of Section 8(c) of the Act Which Should Be Decided by the Court.**

In the case at bar there has never been a determination that the statements of petitioners' officers and supervisors were threats of reprisal or force, or promises of benefit. The statements in question were relied upon by the Board and the Court of Appeals as constituting and being evidence of unfair labor practices by petitioners. The case was decided by the Board before the passage of the Taft-Hartley Act, which added Section 8(c) (29 U. S. C. A. § 158(c)) to the National Labor Relations Act. The petition for enforcement of the Board's order, however, was filed in the Court of Appeals after the passage of that Section. Section 8(c) provides as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

It has been held that that section of the Taft-Hartley Act applies to a petition to enforce an order of the Board, which was entered before the passage of that Act, such as that involved in this case. (See *Pittsburgh Steamship Co.* v. *N. L. R. B.* (U. S. C. A. 6th) decided February 17, 1950, 17 Labor Cases, CCH No. 65612.) This Court, in the same case, strongly indicated the applicability of the Taft-

Hartley Act to such a case (93 L. Ed. 1159, 337 U. S. 656). In *N. L. R. B.* v. *E. C. Atkins Co.* (C. C. A. 7) 165 Fed. (2d) 659, the Seventh Circuit held that the Taft-Hartley Act applied on a remand to it of a case decided by this Court before that Act was passed.

If Section 8(c) is properly applicable to the case at bar, in order to deny petitioners the benefit of that section, a determination would necessarily have to be made as to whether the statements and expressions of petitioners' officers and supervisors contained threats of reprisal or force or promises of benefit, in order for such statements to be considered as constituting and being evidence of unfair labor practices.

The Court of Appeals stated that in determining whether statements are protected by Section 8(c), such statements must not be considered as isolated words cut off from the circumstances and background in which they were spoken. The legislative history of Section 8(c) strongly indicates that the words themselves were only to be considered.[1] However, after announcing this principle the Court of Appeals should have either held that the statements in this case, as so considered, did or did not contain threats or promises or, if it was unprepared to make that determination, it should have remanded the case to the Board for such determination.

This Court, in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, held that the making of such determination was properly the function of the Board. The finding of whether statements did or did not contain threats or promises would appear to be a finding of fact which, under Section 10(e) of the Act, is vested exclusively in the Board. *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584; *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206. It would seem, there-

1. House Report No. 245, 80th Congress, 1st Session, p. 33.

fore, that the Court of Appeals would have exceeded its power in making such a determination, even if it had made one, and the Board should have further considered the matter in the light of Section 8(c) before its order was enforced.

Conceding for purposes of argument, however, the Court of Appeals had power to make such determination, the statements here involved, regardless of how considered, clearly show that there were no threats nor promises, nor do the circumstances under which they were uttered show any. We believe this was apparent to the Court of Appeals, for instead of deciding whether the statements in question did or did not contain threats or promises, within the meaning of Section 8(c), proceeded to hold:

> "Therefore, in determining such statements and expressions constituted or are evidence of unfair labor practice, they must be considered in connection with the positions of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties. *If, when so considered, such statements form a part of a general pattern or course of conduct* which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice." (Emphasis ours.)

It is obvious, therefore, that the Court of Appeals is of the opinion that Section 8(c) made no change in the law and the Board and the Courts can still consider statements and utterances of an employer, as part of a pattern or general course of conduct, which evinces an unfair labor practice, even though they do not contain threats of reprisal or force, or promises of benefit. In practical application of the ruling announced by the Court of Appeals, all statements and utterances of an employer will be considered. It is difficult to imagine any statement of any

employer that might not be considered as "part of a general pattern or course of conduct". All statements of preference, views on labor organization in general and trivial remarks of supervisors would, under the Court of Appeals ruling, become admissible.

It is reliably reported in Volume 2, C. C. H. Labor Law Reporter, 4th Edition, Sec. 5001, Note 20, that the Board's General Counsel in a ruling not officially released, has instructed the Board's attorneys to request trial examiners to admit in evidence all statements alleged to constitute or to be evidence of an unfair labor practice, without ruling on whether or not the statements are coercive, leaving that interpretation for the Board. A more complete disregard of Section 8(c) cannot be imagined. If such statements do not "constitute evidence" they certainly should not be admitted in evidence. However, until the confusion as to the proper interpretation of this section is determined by this Court, such rulings and decisions as that, and in this case, will obtain.

The legislative history of Section 8(c) shows that one of the principal evils that Congress intended to correct was the practice of the Board in using speeches and publications of an employer, no matter how irrelevant or immaterial, that some later act of an employer had an illegal purpose. See *House Conference Report No. 510*, 80th Congress, 1st Session, where it is stated on page 45:

> "Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech. The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form is not to constitute or be evidence of an unfair labor practice if such expression

contains no threat of force or reprisal or promise of benefit. *The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law.* The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." (Emphasis ours.)

See House Report No. 245, 80th Congress, 1st Session, page 33, where it is stated:

> *"Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely.* Thus, if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but 'infer', from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It has similarly abused the right of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bargaining agents. *The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of sections 7 and 8 of the amended act."* (Emphasis ours.)

See Senate Report No. 105, 80th Congress, 1st Session, page 23, where it is stated:

> "* * * The Supreme Court in *Thomas* v. *Collins*, (323 U. S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies

and approved the doctrine of the *American Tube Bending* case (134 F. (2d) 993). The Board has placed a limited construction upon these decisions by holdling such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance,* 69 N. L. R. B. 247) or if the speech was made in the plant on working time (*Clark Bros.,* 70 N. L. R. B. 60). The committee believes these decisions to be too restrictive and, in this section provides that if, *under all the circumstances,*[1] there is neither an express or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. * * *" (Emphasis ours.)

From this legislative history, therefore, as well as the plain language of the Act, it would seem apparent that the old rule of considering statements as "part of a general pattern or course of conduct," or as part of the "totality of the employer's conduct,"[2] when such statements were not of a threatening nature or did not promise a prohibited favorable discrimination, was abolished by this Section.

Other circuits have taken the view that since the passage of 8(c), in order for an employer's statements to constitute or be evidence of an unfair labor practice, they must be of the character excluded from the protection of that Section. (See *Pittsburgh Steamship Co.* v. *N. L. R. B.,* (U. S. C. A. 6th, No. 10372, decided February 17, 1950), 17 Labor cases, (C. C. H. No. 65612); *N. L. R. B.* v. *O'Keefe & Merritt Mfg. Co.,* 178 Fed. (2d) 445, decided December 2, 1949.

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1. The Senate Bill, which was not adopted, would have permitted the Board to consider statements "under all the circumstances" in determining whether or not they constituted threats or promises. The Act was taken almost literally from the House Bill. The Act would seem, therefore, to prevent the Board from using as a basis for a finding of unfair labor practice, or as evidence thereof, any statements that on its face contained no threat of reprisal or force or promise of benefit. (See 173 A. L. R. 1419.)

2. *N. L. R. B.* v. *Virginia Electric and Power Co.,* 314 U. S. 469, same case 319 U. S. 533; *Valley Mould & Iron Corp.* v. *N. L. R. B.,* 116 Fed. (2d) 760; *N. L. R. B.* v. *Continental Oil Co.,* 159 Fed. (2d) 326.

The holding of the 6th Circuit in the *Pittsburgh Steamship Co.* case is directly contrary to the decision of the Court of Appeals in this case. In that case the Court stated:

> "With reference to the right of free speech the legislative history shows that the amendment embodied in § 8(c) of the Taft-Hartley Act was specifically intended *to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct.*" (Emphasis ours.)

Since the passage of this Section, the Board itself has refused to consider statements which are in themselves not coercive, by containing threats or promises, as part of a "general pattern or course of conduct", or as part of the "totality of employer's conduct." See: *General Shoe Corp.*, 77 N. L. R. B. 124; *John Deere Plow Co.*, 82 N. L. R. B. 69; *Mylan Sparta Co. Inc.*, 78 N. L. R. B. 1144; *Tygart Sportswear Co. & MacLaren Sportswear Corp.*, 77 N. L. R. B. 613; *Fontaine Converting Works, Inc.* 77 N. L. R. B. 1386; *Carpenter Steel Co.*, 76 N. L. R. B. 670; *Babcock & Wilcox Co.*, 77 N. L. R. B. 577.

The question as to whether or not the Board or the Court may still consider statements of an employer "as part of a pattern or course of conduct" or as "part of the totality of the employer's conduct" in determining whether or not the employer was guilty of an unfair labor practice, when such statements do not contain threats or promises, is a matter that should be determined by this Court.

## II.

**The Court of Appeals Has Denied the Protection of the First Amendment of the Constitution to the Statements and Utterances of Petitioners' Officers and Supervisors, in Which There Were No Threats or Promises to Use Petitioners' Economic Power as an Employer.**

Quite apart from the proper interpretation of Section 8(c) of the Act, this case presents a question under the First Amendment of the Constitution of the United States. The language of that amendment, applicable here, is as follows:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

This Court has held that the guaranteee of this amendment applies to the expressions and utterances of the employer on labor matters to his employees. *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Thomas* v. *Collins*, 323 U. S. 516; and *Thornhill* v. *Alabama*, 310 U. S. 88.

This guarantee is not an absolute guarantee, however (see *Schenck* v. *U. S.*, 249 U. S. 47 and *Thomas* v. *Collins*, 323 U. S. 516), and Congress may prohibit certain speech which has a clear and present danger to cause certain acts, the evil of which Congress has a right to prevent.

While we believe that it was the intent of the decision in the *N. L. R. B.* v. *Virginia Electric & Power Co.* case (314 U. S. 469) to apply this "clear and present danger" rule, it is not at all clear from that decision. At least this seems to be the interpretation of that decision in *Thomas* v. *Collins*, 323 U. S. 516, and other Courts have followed the view that unless the language or speech of an employer contains threats or promises to use the economic power of an employer to override the will of the

employees, the employer was at liberty to express itself. *N. L. R. B.* v. *Brown Brockmeyer Co.* (C. C. A. 6), 143 F. (2d) 537; *Edward G. Budd Mfg. Co.* v. *N. L. R. B.* (C. C. A. 3), 142 F (2d) 922; *N. L. R. B.* v. *Montgomery Ward & Company* (C. C. A. 8), 157 F. (2d) 486; *N. L. R. B.* v. *Caroline Mills, Inc.* (C. C. A. 8), 158 F. (2d) 793; *N. L. R. B.* v. *Continental Oil Co.* (C. C. A. 10), 159 F. (2d) 326; *N. L. R. B.* v. *J. L. Brandeis & Sons* (C. C. A. 8th), 145 F. (2d) 556; and *N. L. R. B.* v. *American Tube Bending Co.* (C. C. A. 2nd), 134 F. (2d) 993.

An examination of the statements made by petitioners' officers and supervisors and the circumstances in which they were made, shows that they contained no threats or promises to use petitioners' economic power. Petitioners are dealing with five labor unions in their plant, three of which are A.F. of L. unions, one of which is affiliated with a National union not connected with either the A.F. of L. or C.I.O., and the Association, which is an independent union. They have never reprimanded an employee for union activity, except on one occasion which the Board found was justified (R.A. 58, B.A. 84), and have allowed the employees to engage in union activities and discussions of union matters freely within the plant during working hours (B.A. 84; R.A. 67, 31-32, 46-50).

Petitioners' officers and supervisors should have that same freedom of discussion of labor matters as its employees had. The rule of law, applicable, should not be so narrow as to grant freedom of speech to one side of a labor controversy and withhold it from the other, nor should "a perfectly innocent statement, including neither a threat nor a promise"[1] be made unlawful by reason of the fact it is made by an employer. The right of free speech should never rest or depend on the person exercising that right.

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1. See opinion of the Court of Appeals below.

The Court of Appeals quotes from *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, that "slight suggestions as to the employer's choice between unions may have a telling effect among men who know the consequences of incurring the employer's strong displeasure." This phrase was also quoted by this Court in *N. L. R. B.* v. *Virginia Electric & Power Company.* Certainly the *International Association of Machinists* case did not hold that such "slight suggestions" voiced by an employer were beyond the protection of the First Amendment and that does appear to be the reasonable interpretation of the *Virginia Electric & Power Co.* case. If such is the correct rule, certainly the First Amendment has no application in the field of labor relations and particularly to the speeches and utterances of an employer to his employees. Any expression of an employer conceivably could be interpreted as a "slight suggestion". In *Edward G. Budd Mfg. Co.* v. *N. L. R. B.*, 142 F. (2d) 922, the Third Circuit held "slight suggestions" alone were not sufficient to sustain a finding of unfair labor practice. How, in view of the First Amendment, they could ever constitute or become evidence of an unfair labor practice or lose their character as free speech, even when some other act is committed by the employer, is difficult to understand.

The confusion regarding the *Virginia Electric* case and particularly now, since the passage of Section 8(c), necessitates a further consideration of this Court of the applicability of the First Amendment to statements and utterances of an employer or its officers or supervisory personnel. Members of this Court seem to have entertained different views of the *Virginia Electric & Power* case in *Thomas* v. *Collins, supra.* Mr. Justice Jackson felt that the Courts were denying to employers the same rule and spirit of free speech that it applied to employees and union organizers, and indicated that a further consideration of the applicability of the First Amendment to an

employer's statement was desirable, in his separate opinion in that case.

## Conclusion.

This case presents matters of interpretation of Section 8(c) of the Act which have not heretofore been considered by this Court; the decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal as to the interpretation of this section, and is in conflict with the decisions of the National Labor Relations Board, and completely disregards the legislative intent of Congress in passing this section. The Court of Appeals has further denied the protection of the First Amendment to the Constitution to the statements and utterances of petitioners' officers and supervisors, in which there were no threats or promises to use any of its economic power as an employer. The case therefore presents such matters of importance as to justify the granting of a writ of certiorari to the Court of Appeals for the 7th Circuit, to the end that these matters may be reviewed and determined by this Court.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 782

KROPP FORGE COMPANY AND KROPP FORGE AVIATION CO., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (R. A. 107–118)[1] is reported at 178 F. 2d 822. The findings of fact, conclusions of law, and order of the Board (B. A. 42–97) are reported at 68 NLRB 617.

[1] References to portions of the record contained in the appendices prepared by the Board and by petitioners are referred to as "B. A." and "R. A." respectively.

## JURISDICTION

The Companies' petition for rehearing was denied on January 31, 1950 (R. A. 119). The decree of the court below was entered on the same day (R. A. 120–123). The petition for a writ of certiorari was filed on April 27, 1950. The jurisidiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

Petitioners urge that six questions are presented for determination by this Court (Pet. 11–12). We submit, however, that only the following question need be decided:

Whether the Board's finding that statements made by petitioners' officers and supervisory personnel to employees concerning organizational activities "went further than merely expressing an opinion as to the merits of the labor organization involved," and therefore constituted evidence of unfair labor practices, is supported by substantial evidence on the record considered as a whole.[2]

[2] As we show below (pp. 14, 16, 18–19), both the Board and the court below made it clear that if the statements in question had been found to be mere expressions of opinion not containing threats or promises of benefit, the statements would have been held protected by the First Amendment. Consequently, petitioners' question numbered 2 (a), "Does the First Amendment apply to the statements and utterances of an employer to its employees," is not properly presented. For

## STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 26–29.

## STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on June 14, 1946, issued its findings of fact, conclusions of law, and order (B. A. 42–97).

### I. THE FACTS AS FOUND BY THE BOARD

Kropp Forge Aviation Co. is a wholly owned subsidiary of Kropp Forge Company and has its office and principal place of business on the latter's premises in Cicero, Illinois, where both companies are engaged in the manufacture of steel forgings (B. A. 51–53; 100–101, 205–206, 263–264, 268–269, 271, 273).[3] For all purposes here relevant, both companies acted as one and

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the same reason, petitioners' questions numbered 1 (c) and 2 (b), which rest on the assumption that the statements were found to be mere expressions of opinion, are not properly presented.

[3] References preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

will hereinafter be referred to as the Companies (B. A. 44–45, 51–53; 259–260, 266, 275–276).[4]

At the outset of organizational activities in 1939 among the Companies' employees, Plant Manager Hellstrom twice told employee Ohlson, an old employee and the leader of the organizational drive, that he wanted no organization in the plant (B. A. 54, 56; 108, 118, 187). When, notwithstanding management's expressed opposition, 90 percent of the employees signed petitions calling for the formation of some kind of a labor organization, Roy Kropp, president of the Company, summoned fifteen or twenty employees, "the key men in the shop," to a conference, at which they were told that although the Company could not stop them from organizing, these employees were to "try to make it a shop organization," restricted in membership to employees in the plant (B. A. 54–55; 104–105, 107–108, 112, 113–114, 115–117, 130, 279–281). The Company offered to permit the employees to use the plant machine shop for the purpose of holding a meeting to determine what kind of an organization they desired (B. A. 56; 118–119, 124, 131). As soon as it was announced that such a meeting would be held, the Company scheduled a party to be held at the same time and place, ascribing as the reason for the party the successful winding

[4] Petitioners in the court below and in this Court have abandoned any contention based on the fact that the two companies here involved are separate corporate entities.

up of the old year (B. A. 56–57; 105–106, 112, 113, 118–121, 137, 323). Two hours before the employee meeting was held, President Roy Kropp stopped employee Ohlson and told him that he didn't care whether the employees chose an independent organization or one affiliated with the A. F. of L., but "for the love of Pete, anything but the C. I. O." (B. A. 56; 120).

The employee meeting and the Company party proceeded as scheduled. Plant Manager Hellstrom welcomed the employees to the meeting, then left. A voice vote was taken by the employees and the majority chose to be represented by a "shop organization." Hellstrom then returned for the Company party as did two of the Company's foremen. The latter congratulated Ohlson on the employees' choice of an independent organization (B. A. 58, 43; 120–123, 129, 202–203).

Within one week after the machine shop meeting, the formal organization of the independent organization, herein referred to as the Association, was completed (B. A. 58–59; 109, 113, 115, 124). One month later, the Association submitted a proposed collective bargaining contract to the Company with a letter emphasizing the independent, unaffiliated nature of the Association, asserting its majority status, and requesting recognition as exclusive bargaining representative of the employees (B. A. 59; 109–110, 124–126, 137, 323–324). President Roy Kropp then met

with a committee from the Association, asked for proof of the Association's majority status, and was given the petitions which had been circulated at the outset of the organizational campaign (B. A. 60; 124–125, 280–281). Kropp gave the petitions only a cursory glance and returned them (B. A. 60; 125). Despite the fact that these petitions antedated the formation of the Association, that they did not specify the Association or any other organization as being the choice of the employees, and that no check was made as to the number or validity of the signatures on the petitions, the Company at once granted the Association exclusive recognition (B. A. 43, 60; 126, 212, 213). The Company did not accept the Association's proposed contract but, instead, submitted its own contract to which the Association promptly assented (B. A. 60; 111, 228). This contract was renewed annually in substantially identical terms for the next three years (B. A. 62–63, 65; 126, 166, 325–333).

For the first few years of the Association's existence membership and dues were openly solicited and collected in the plant during working hours (B. A. 64; 147, 148). Nevertheless, despite a very substantial increase in the number of employees, interest in the Association declined to the point where, during the latter half of 1942, it was found impossible to assemble a quorum of

fourteen members for an Association meeting (B. A. 64; 232, 178, 191–192, 206). Notwithstanding this obvious lack of interest in the Association, the Company, at the beginning of 1943, inaugurated a check-off system under which, at no cost to the Association, dues of fifty cents a month were regularly deducted from the wages of each employee named on a list supplied by the Association (B. A. 64; 175–176, 190–191, 240–241, 247–248).

In 1943, also, the Company, pursuant to a request of the War Production Board, organized a Labor Management Committee for the purpose of increasing war production (B. A. 65–66; 132, 136–137, 176, 179–180, 184, 214–215). The War Production Board program provided that membership on labor management committees should consist of an equal number of employer and employee representatives, the latter to be selected by the recognized union if there was one (B. A. 66). The scope of the activities of these committees was designed to comprehend the consideration and improvement of all aspects of the production process which would tend to increase the quantity and quality of the products manufactured (*ibid.*). Specifically excluded from the proposed agenda of these committees was any consideration of grievances or other collective bargaining matters; these were to be left to established labor-

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relations channels (*ibid.*).[5] O'Keefe, Industrial Relations Director of the Company, effectively preempted the employees' right to choose their own representatives by suggesting that the officers of the Association act as the labor representatives on the Committee (B. A. 67; 214–215). The unions representing the truck drivers and the die sinkers were ignored as were those production and maintenance employees who were not members of the Association (B. A. 67, n. 17; 167, 182, 183, 346–347). The Committee, so constituted, almost from its inception, handled not only production problems but grievances, wage increases, and numerous other matters which were properly subject to the usual processes of collective bargaining (B. A. 67–68; 141–142, 149, 176–177, 183, 187, 222). This practice continued even though the Company was aware of the impropriety of the procedure, and in the face of the fact that the truck drivers and die sinkers were concededly not represented on the Committee (B. A. 73, 74, 79; 186–187, 346–349). In addition, reports of rival union activities in the plant were discussed and appropriate action planned (B. A. 68, 69, n. 18; 103, 337–340).

[5] The facts concerning the proper function of the Labor Management Committee are undisputed, and are set forth in the August 16, 1943, issue of the Labor Management News, Vol. I, No. 4, an official publication of the War Production Board, introduced into evidence as Board Exhibit 20 (Tr. 463).

The prolonged negotiations for the 1944 agreement between the Association and the Company, and the terms of that agreement, when consummated, created considerable dissatisfaction among the employees and rival unions began actively to compete for the employees' favor (B. A. 71–72; 143–144, 165–166, 168–169, 171, 196, 333–336). The Labor Management Committee, thereupon, in May or June 1944, discussed the problem of getting more members to attend Association meetings and requested that the Company permit Association shop stewards who worked on Sunday to take time off with pay at the prevailing overtime rate to attend regular meetings of the Association (B. A. 73; 145, 150, 162–163, 171–172). The Company promptly granted this request (*ibid.*) In addition, stewards' meetings were often held on plant property and during working hours with the permission of the Company (B. A. 78; 157–158).

At least twice during this same period, at a time when rival unions were waging particularly vigorous campaigns, responsible officials of the Company inquired about and attempted to discourage these rival union activities. About the middle of June, 1944, Sweeney, who had succeeded Hellstrom as plant manager, summoned employee Areen to his office and asked him what he knew about the A. F. of L. (B. A. 75; 241–242). When Areen indicated that he was not interested, Sweeney said "Well, Dave, stick with me; you

will go places" (*ibid.*). Toward the end of the same month, employee Clinton went to Superintendent Lane and asked him for a raise. Lane countered by asking Clinton what he knew about the A. F. of L. (B. A. 77; 148–149). When Clinton stated that "there was activity within the shop," Lane retorted "We don't want the A. F. of L. in here. * * * They won't do us any good. * * * The Association could do as much for the men or more" (B. A. 77; 148–149, Tr. 241). Lane gave Clinton no specific answer as to the requested raise (*ibid.*).

On June 26, 1944, the International Union of Blacksmiths, Drop Forgers and Helpers, A. F. of L., made plans for an organizational meeting of the Company's employees to be held on June 29 (B. A. 75; 237). On the following morning, a representative of the United Automobile Workers, A. F. of L., another rival union, implemented a previous request for a bargaining conference with the Company by warning that unless such "a meeting was arranged immediately, he would shut the plant down" (B. A. 75–76; 185, 192, 230, 354). Later that morning there was an hour's work stoppage in the Company's flat die department (B. A. 76; 185, 192, 223–224, 196, 197, 219). The president of the Association was immediately summoned by the Company to explain these developments (B. A. 76; 185, 192, 223–224, 196, 197, 219). He asked permission of the Company to hold a meeting on June 29 between three and

five in the afternoon, the time for which the Blacksmiths' meeting had been scheduled, to see whether "they couldn't get this thing straightened out" (B. A. 76; 193, 197–199, 223–225). Since the shifts in the plant changed at four p. m., he also asked that in order to facilitate the meeting, the first shift be allowed to leave work an hour early and that the second shift be allowed to report to work an hour late (B. A. 76; 193, 197–199, 223–225). Both requests were granted (*ibid.*). Despite the fact that the urgency upon which this meeting was predicated—namely, the UAW's threat of a shutdown unless it was granted a bargaining conference—was dissipated on the following day when the UAW and the Company engaged in an amicable conference, the Association meeting was held as scheduled (B. A. 76–77; 146–147, 153, 164, 169–171, 186, 191, 193–194). Pursuant to Plant Manager Sweeney's instructions, the Company's supervisors told employees on the first shift that they would be excused an hour early for the Association meeting; employees reporting for work on the second shift were told of the meeting by the plant guards and were additionally informed that they would be paid for their time (B. A. 77; 152–153, 156, 159–160, 163–164, 174, 226). All employees who attended the meeting, the largest in the Association's history, were paid for the time thus spent (B. A. 77; 146–147, 157, 164, 206, 221, 153, 160, 216–217). The meeting of the

Blacksmiths' union was held in two sessions, one for each shift; it was attended by only a handful of the employees (B. A. 77–78; 160, 165–166, 235–237).

In February 1945, the Company executed a new one-year contract with the Association to be effective March 1. This new contract adopted a grievance procedure which the Company had unilaterally established several months earlier, and specifically assigned the Labor Management Committee a role in the settlement of grievances (B. A. 78–79; 103, 177–179, 310, 312–322, 352–353).

### II. THE BOARD'S CONCLUSIONS AND ORDER

On the above facts the Board concluded that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (B. A. 42–43).* The Board predicated this conclusion upon the following findings (B. A. 43–44):

> (1) When the employees were forming a labor organization, the Forge Company urged them to make it a shop organization, gave them a party designed to influence them to that end, and congratulated them when they voted to follow management's desire. (2) Subsequently when the unaffiliated Association requested exclusive recognition, the Forge Company granted the

*The later amendments to the Act made no relevant changes in these provisions.

request without proof of majority. (3) Thereafter, the Companies contributed support to the Association in various ways: by paying certain employees for the working time they spent in attendance at Association meetings; by agreeing to excuse employees during working hours to attend an Association meeting in the latter part of June 1944, when the Association appeared to be on the verge of yielding to outside unions as the employees' representative, and by advising the employees to attend the meeting and paying them for the working time so spent; by according to the Association the right of exclusive representation of the employees (including die sinkers and truck drivers not represented by the Association) in Labor Management Committee meetings which, in part, considered collective bargaining matters; by discussing plans at Labor Management Committee meetings to encourage membership in the Association and discourage rival activity, and by thereafter carrying out such plans; by granting the Association a cost-free irrevocable check-off; and by stating that the Association could do more for the employees than an outside union. (4) The Companies further assisted the Association by the statements of President Roy Kropp that he did not want the C. I. O., and Superintendent Lane that the Companies did not want the A. F. of L. and by the questioning of employees

> by Plant Manager Sweeney and Superintendent Lane about the A. F. of L.
>
> * * * * *
>
> We find, upon the entire record, that the respondents dominated and interfered with the formation and administration of, and contributed support to, the Association. We further find that by such acts, and by the statements and questions of President Roy Kropp, Plant Managers Hellstrom and Sweeney, and Superintendent Lane, the respondents interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.

The Board gave careful consideration to the Company's contention that the statements thus referred to fell within the free-speech guarantee of the Constitution because they were mere expressions of preference and contained no "threat, coercion or intimidation" (B. A. 44). The Board specifically stated that

> In the light of the [Company's] entire course of conduct and *also because the statements went further than merely expressing an opinion as to the merits of the labor organization involved, we find* * * * *that the statements were not privileged as free speech.* [Emphasis supplied] (B. A. 44).

Upon these findings the Board ordered the Company (B. A. 46–48) to cease and desist from dominating or interfering with the administra-

tion of, or giving support to the Association or any other labor organization; from recognizing the Association or any successor thereto as bargaining representative of their employees; from giving effect to their 1945 contract with the Association or to any modification, extension, or renewal thereof; and from in any manner interfering with Section 7 rights of their employees. The Board ordered the Company affirmatively to withdraw recognition from and to disestablish the Association, to discontinue the Labor-Management Committee as a medium for dealing with their employees concerning grievances and other collective bargaining matters, and to post appropriate notices of compliance with the order.

### III. THE OPINION OF THE COURT BELOW

Upon the Board's petition for enforcement, the court below, on December 30, 1949, entered its decision enforcing the Board's order in full (R. A. 107–118). The court carefully reviewed the Board's findings of fact and, applying the standard of review contained in Section 10 (e) of the amended Act, concluded that those findings were supported by substantial evidence not only with respect to the acts and conduct of the Company's representatives, but also with respect to their statements (R. A. 114).

The Company contended before the court that Section 8 (c) of the amended Act, enacted after

the issuance of the Board's order but prior to its petition for enforcement, precluded enforcement of the order.[7] It argued that the utterances of its officials and supervisors were merely expressions of opinion, not containing threats or promises, which could not, by virtue of that section, be considered as constituting or being evidence of unfair labor practices. The Company further urged that the Board's decision was based *primarily* on these utterances, and that, if they were eliminated, the order could not stand.

The court below, assuming *arguendo,* as the Companies claimed, that the Board's order was based primarily on the utterances of the Company's representatives, held that the utterances were not of the character protected by Section 8 (c). The court pointed out that, in its view, even before the enactment of Section 8 (c), the employer's expressions of views or opinions were protected by the First Amendment to the Constitution, and that such expressions were not protected only when they contained threats or promises (R. A. 115).[8] The court concluded that on

[7] Section 8 (c) provides, so far as relevant here, that "The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of any unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit."

[8] The court below cited the following decisions: *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477; *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d

this state of the law, the language of Section 8 (c) "seems to us no more than a restatement of the principles embodied in the First Amendment * * *" (R. A. 117). The court rejected the Companies' contention that the statements in question were mere expressions of opinion, not containing threats or promises, and held that those statements "were properly considered by the Board as constituting, and as evidence of, unfair labor practice by the [Companies]" (R. A. 118).

**ARGUMENT**

1. Since the Board's hearing and decision in the instant case antedated the enactment of Section 8 (c) in 1947, we do not believe this provision applicable.[9] But in this case it is unnecessary to reach that question; we shall assume for present purposes that Section 8 (c) is applicable.

2. Section 8 (c) does not preclude the Board from taking into account statements which are

647 (C. A. 5); *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 175 F. 2d 675 (C. A. 5); *National Labor Relations Board* v. *Ford*, 170 F. 2d 735 (C. A. 6); *National Labor Relations Board* v. *Peterson*, 157 F. 2d 514 (C. A. 6), certiorari denied, 330 U. S. 838; *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760 (C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *LaSalle Steel Company*, 178 F. 2d 829 (C. A. 7), certiorari denied May 29, 1950, No. 701, this Term; *Sax* v. *National Labor Relations Board*, 171 F. 2d 769 (C. A. 7); *National Labor Relations Board* v. *Continental Oil Co.*, 159 F. 2d 326 (C. A. 10).

[9] Our reasons are briefly stated in our petition for certiorari in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 732, pp. 8–9.

in fact coercive. Statements which amount to "pressure exerted vocally" by the employer are not protected either by the First Amendment or by Section 8 (c). *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Thomas* v. *Collins*, 323 U. S. 516; *National Labor Relations Board* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 447 (C. A. 9); cf. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, No. 61, this Term, decided May 8, 1950; *Teamsters Union* v. *Hanke*, No. 309, this Term, decided May 8, 1950; *International Brotherhood* v. *National Labor Relations Board*, decided February 24, 1950 (C. A. 2); *National Labor Relations Board* v. *La Salle Steel Co.*, 178 F. 2d 829 (C. A. 7), certiorari denied, May 29, 1950, No. 701, this Term. As Senator Taft specifically stated in the course of debate on the bill which became the amended Act, Section 8 (c) "has no application to statements which are acts in themselves or contain directions or instructions" (93 Cong. Rec. 6444, 6860).

3. In this case the Board specifically rejected petitioners' claim that the statements here in question were mere expressions of opinion containing no threats or promises of benefit and were therefore protected by the First Amendment and Section 8 (c). Addressing itself to this precise contention, the Board found that "In the light of the [Company's] entire course of conduct and also *because the statements went further than merely expressing an opinion as to the*

*merits of the labor organization involved * * * the statements were not privileged as free speech"* [Emphasis supplied] (*supra,* p. 14).

Petitioners' contention (Pet. 3, 4, 10, 11, 12, 17) that the statements were mere non-coercive expressions of opinion challenges only the substantiality of the evidence which supports the contrary findings of the Board, a question not warranting review by this Court. In any event, as the facts set forth in the Statement show (*supra,* pp. 3–12), and as the court below held (R. A. 114), the Board's factual determinations in this regard are amply supported by the evidence.[10] Plant Manager Hellstrom's statement, at the inception of organizational activities, that he wanted no organization in the plant; President Kropp's subsequent statement to the key employees that while the Company could not stop organizational activities completely, the employees were to "try to make it a shop organization"; and his statement to employee Ohlson that he did not want a C. I. O. union in the plant, were not expressions of opinion but were direc-

[10] It should be noted that the Board's findings that petitioners violated the Act are predicated to a large extent on acts and conduct, other than the statements, which were clearly violative of Section 8 (1) and (2). We do not agree with petitioners' claim, advanced in the court below, *supra,* p. 16, that the findings rested "primarily" on the statements. Petitioners do not now contend that these findings were invalid, but urge merely that since the conclusionary findings were based upon statements as well as upon acts, the decision may not be upheld if the impropriety of the statements is not established.

tions or instructions, which the employees were not free to ignore.[11] Cf. *National Labor Relations Board* v. *La Salle Steel Co., supra.*

Plant Manager Sweeney's statement to employee Areen, *supra,* pp. 9–10 "Dave stick with me. You will go places," clearly amounted to a promise of benefit contingent on the employee's submission to management's desires in the field of self organization, and was therefore not protected by Section 8 (c). The questioning of employees as to A. F. of L. activities by Superintendent Lane and Plant Manager Sweeney likewise was "not protected by Section 8 (c) of the Act, * * * and was an unfair labor practice." *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.,* 179 F. 2d 323, 326 (C. A. 8); see also cases cited in Brief for the National Labor Relations Board in Opposition, *LaSalle Steel Company* v. *National Labor Relations Board,* No. 701, this Term, pp. 28–29.

4. The court below held that Section 8 (c) does not require that the coercive nature of the statements be determined from their bare language, apart from the context in which they are uttered.

[11] That the employees regarded these statements as managerial directives with which they were required to comply is apparent from employee Edberg's description of the conference to which the employees were summoned. Edberg testified (B. A. 55; 107) that the Kropp Forge officials there "suggested or referred to it that they couldn't stop us in regard to organizing, but to try to make it a shop organization *which we did.*" (Italics added.)

Although, for reasons stated below, we think this unquestionably correct, the evidence and the Board's findings make it unnecessary to meet this contention in the present case. For if, as the Board found, "the statements went further than merely expressing an opinion", it is immaterial whether they are also coercive in the light of the surrounding circumstances. This would therefore not seem to be an appropriate case in which to grant certiorari in order to determine the question which petitioners seek to raise.

5. In any event, the view of the court below (R. A. 117) that Section 8 (c) does not require that utterances be "considered as isolated words cut off from the relevant circumstances and background in which they are spoken," is in accord with the terms and policy of that Section. Petitioners' contention (Pet. 18–20), that the legislative history of Section 8 (c) shows that Congress intended to preclude the Board from resorting to anything but the "express terms" of a statement to determine its coercive or non-coercive character is without merit.

Section 8 (c) does not repudiate the previous rule under which utterances were uniformly judged in the light of their immediate context.[12] The Senate bill (S. 1126), expressly authorized the Board to give consideration to "all the circumstances" in determining whether a statement

[12] See note 8, *supra*.

was coercive. However, because Congress believed that the Board had gone too far in condemning non-coercive statements solely because the employer had engaged in "severable or unrelated" unfair labor practices, this provision of the Senate Bill, which could have been construed as approving this practice, was omitted.[13] That Congress did not, however, thereby intend to preclude the Board from considering utterances in their immediate context is evidenced by the fact that the provision proposed in the House Bill (H. R. 3020, Section 8 (d) (1)), which exempted all statements except those which threatened force or economic reprisal "by [their] own terms" was not adopted. As the court below stated (R. A. 118), petitioners' view "would nullify the guarantee of employees' freedom of action and choice which Section 7 of the Act expressly provides. Congress, in enacting Section 8 (c), could not have intended that result."[14]

6. Other decisions of the courts of appeals, cited by the court below (R. A. 116–117), are in

[13] S. Rep. No. 105, 80th Cong., 1st Sess., p. 23; H. Rep. No. 245, 80th Cong., 1st Sess., p. 23; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; 93 Cong. Rec. 4137.

[14] Thus, a statement by an employer to an employee that "in my opinion it would be better for you if you did not join the union" might on its face appear to be merely a statement of opinion. But if the employer was displaying a discharge slip at the same time, or had recently discharged other employees for membership in the union, the statement would obviously be coercive.

accord with this position. There are no conflicting decisions.

In *Pittsburgh Steamship Co.* v. *National Labor Relations Board*, 180 F. 2d 731, certiorari granted, May 8, 1950, the Board had conceded that the employees' letters would not have been coercive under Section 8 (c), and contended only that that provision did not apply to cases decided before it was enacted. The Sixth Circuit was not called upon to, and did not, determine the meaning of Section 8 (c) in relation to the question raised by petitioner here.[15]

*National Labor Relations Board* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445 (C. A. 9), in which petitioners claim (Pet. 12) the Court of Appeals for the Ninth Circuit took a contrary position, is entirely consistent with the views of the court below. In that case the court, discussing Section 8 (c), stated (at p. 448):

> We realize that words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance.

[15] In the *Pittsburgh Steamship case*, the Sixth Circuit said, in the passage quoted by petitioner (180 F. 2d at 735):

"With reference to the right of free speech the legislative history shows that the amendment embodied in § 8 (c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

The Board does not question this statement of law. But the sentence quoted does not say or mean that the coercive character of words or statements cannot be determined from closely related circumstances.

> Even so, we do not find in the words used here anything which can be construed as coercive. That being so, it is our responsibility to say, as we do, that the finding of coercion through the speeches is not based upon substantial evidence.

We are aware of no decision in which any court has taken a contrary position.

The Board decisions which, petitioners claim (Pet. 12, 21), are inconsistent with the views of the court below, are distinguishable. In all but two of the cases the Board did no more than give effect to the Congressional objective, discussed above, by holding that non-coercive statements would not be deemed unfair labor practices merely because the employer had engaged in unrelated discriminatory conduct. In the remaining decisions, *Fontaine Converting Works, Inc.*, 77 N. L. R. B. 1386, and *Babcock & Wilcox Co.*, 77 N. L. R. B. 577, the Board gave effect to an additional objective disclosed by the legislative history of Section 8 (c) (S. Rep. No. 105, 80th Cong., 1st Sess., p. 23), namely, to eliminate the "compulsory audience" doctrine, and held that an employer's speech was not coercive merely because the employees had been ordered by the employer to listen to it.

## CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a

conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1950.

## APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranted in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the

Board for such purposes, shall have power to issue and cause to be served on such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. * * *

* * * * *

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, 141 *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. * * *

* * * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * *

"SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its mem-

ber, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * *. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

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